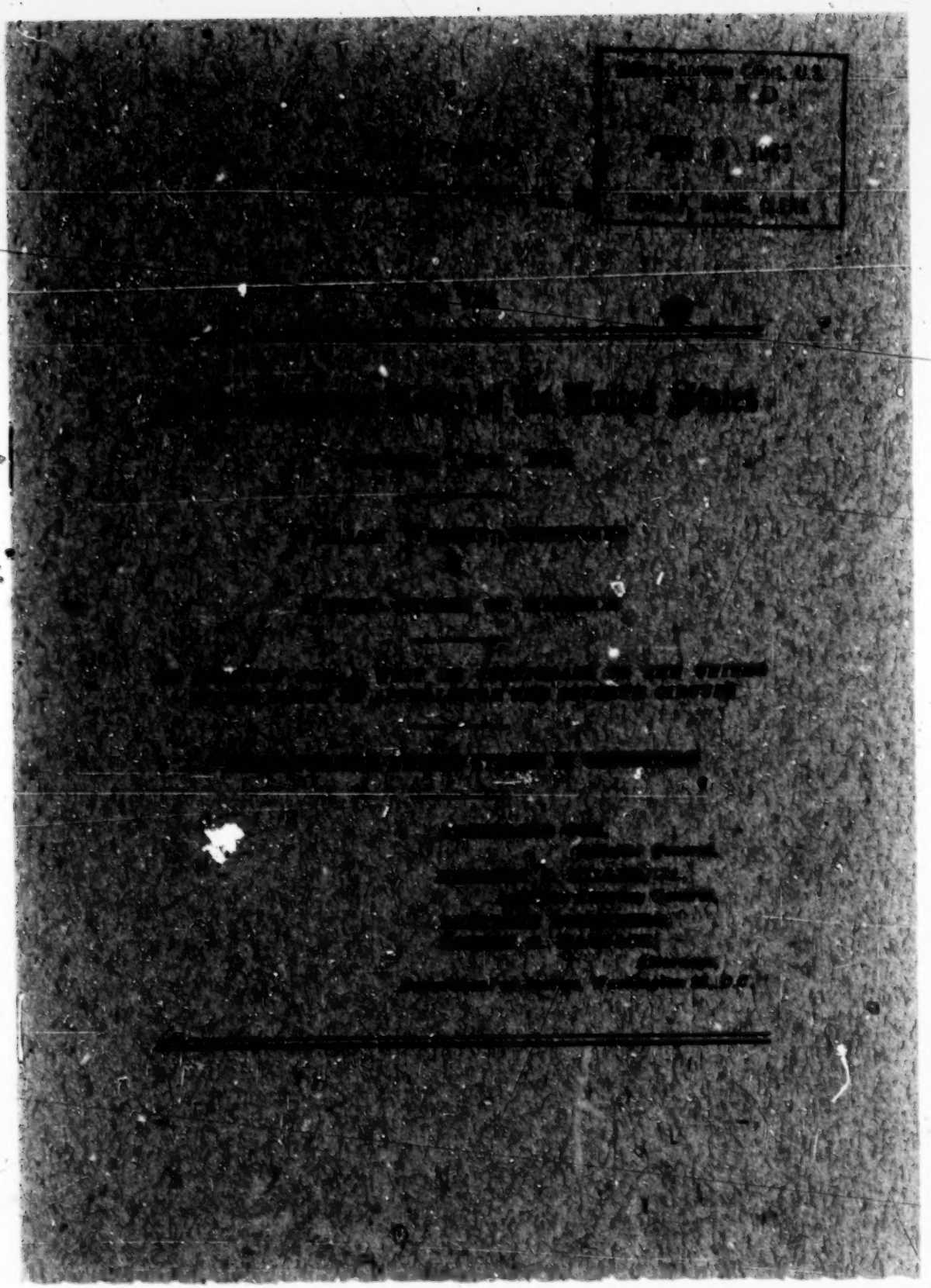

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 734

WILLIAM WRIGHT, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–8) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on October 31, 1962 (Pet. App. 9). A petition for rehearing was denied on December 12, 1962 (Pet. App. 10). The petition for a writ of certiorari was filed on January 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support petitioner's conviction.

2. Whether there was a proper joinder of counts charging both substantive offenses and a conspiracy.

3. Whether remarks made by the prosecutor were improper.

## STATEMENT

Petitioner and Michael Carioscia were charged in Count 5 of an indictment returned in the United States District Court for the Northern District of Illinois with the unlawful sale of heroin on June 16, 1960, without a written order form in violation of 26 U.S.C. 4705(a), and in Count 6 with receiving, concealing, and facilitating the transportation of this heroin after unlawful importation in violation of 21 U.S.C. 174 (R. 5–6). Petitioner, together with Armando Pennacchio, Ben Pennacchio, and Carioscia, were charged in Count 11 with a conspiracy to violate 21 U.S.C. 174 (R. 8–9). Counts 1, 2, 3, 4, 7, 8, 9, and 10 charged various substantive violations of 26 U.S.C. 4705(a) and 21 U.S.C. 174 by Armando Pennacchio, Ben Pennacchio, and Carioscia (R. 4–5, 6–8). Armando Pennacchio and Carioscia pleaded guilty before trial (R. 402). The jury found Ben Pennacchio not guilty on all counts in which he was named, *i.e.*, 7, 8, 9, 10, and 11 (R. 20). Petitioner was found guilty on Counts 5, 6, and 11 (R. 21–22), and was sentenced to imprisonment for five years (R. 27–28). On appeal (R. 29–30), the conviction was affirmed (Pet. App. 9).

1. Prior to trial petitioner filed a motion to dismiss the indictment on the ground of misjoinder since the charges in Counts 1–4 and 7–10 were not provable by the same evidence and did not result from the same

series of facts charged in Counts 5 and 6. The court denied this motion (R. 11–12, 14). After conviction petitioner filed a motion in arrest of judgment, alleging that the government had not proved the conspiracy charged in Count 11 and hence that there had been an improper joinder. The court also overruled this motion (R. 22–23, 28).

2. Evidence adduced at the trial showed that on March 16, 1960, Carioscia and Armando Pennacchio sold heroin to federal narcotics agent Theisen in Chicago for $3,360 (R. 44–49, 54–57, 393). On March 31, petitioner and Carioscia, under assumed names, flew from Chicago to New York (R. 211–213, 239, 240). On April 19, Armando Pennacchio told agent Theisen that he and Carioscia had been followed lately, and that things had not been going too well, but that if he had "that other guy" they could do business with Theisen (R. 64–65). On April 28, Carioscia sold 75.62 grams of heroin to agent Theisen in Chicago for $1,200 (R. 68–70, 394). On April 29, there was a long-distance telephone call from Armando Pennacchio's residence in Chicago to petitioner's residence in New Jersey (R. 37).[1]

On May 25, petitioner registered at the Country Club Motel, Melrose Park, Illinois, Room 101, under the assumed name "J. Harris," and on that date a telephone call was placed from the petitioner's room to Armando Pennacchio's residence (R. 37, 38, 367,

[1] Petitioner lived at Fort Lee, New Jersey, where his wife had an unlisted telephone number (R. 36, 264–265, 272, 335–336). Between February 17 and March 24, 1960, there were six long-distance calls to the number of petitioner's wife from the Chicago telephone number of Armando Pennacchio (R. 37).

378–379, 373). On May 28, 1960, agent Theisen, who was with special employee Luna at the bar section of the North Avenue Steak House, asked Carioscia whether he (Theisen) could pay $2,300 of the $3,750 price for a quarter kilo of heroin which Carioscia was demanding and pay the balance in a few days. Carioscia answered that "he would have to talk to his man about it, that the man was right there, and he pointed to the bar * * *" (R. 74–76, 45).

Theisen and Luna left at about 1:40 a.m. (R. 76, 152, 153). Carioscia then entered the restaurant part of the Steak House, sat down with petitioner and three other men, and had a conversation with them (R. 153–154). At about 3:40 a.m., Carioscia and petitioner drove to the Country Club Motel (R. 154). At about noon the same day Carioscia telephoned Theisen to say that he had talked to "the guy" right after Theisen and Luna walked out the night before, and the consignment deal was off, cash being required (R. 76, 77). On May 29, there was a telephone call from petitioner's motel room to the residence of Carioscia (R. 374, 37–38). On June 2, petitioner checked out of the Country Club Motel (R. 38).

On June 6, 1960, Carioscia told Theisen that he was not sure he had enough heroin on hand to do business. On the following day Armando Pennacchio informed Theisen that they were "temporarily out," but that he would call within the next few days when they had enough heroin to take care of the business (R. 77–78). On June 13, petitioner again registered at the Country Club Motel under the assumed name "J. Harris" (R. 39, 367, 368, 378–379). On June 16,

1960, when Carioscia telephoned Theisen to arrange for another sale, Theisen said he had all the money and was ready to do business. Carioscia promised to call back between 8:30 and 9:00 p.m. (R. 78–79). At 7:00 p.m., Carioscia left his residence and an hour later his car was observed on the parking lot of the North Avenue Steak House (R. 215–216, 251). At about 8:20 p.m., petitioner and Carioscia were seated together at the bar (R. 338). Shortly after 8:30 p.m., petitioner left the Steak House, entered a 1956 Oldsmobile, and began to pull out of the parking lot (R. 339, 360, 362). When petitioner returned at about 8:55 p.m., he walked up to Carioscia, gave him some keys, and said, "Everything is okay" (R. 339, 361). Carioscia made several attempts to make a telephone call and informed petitioner that the line was busy. (R. 339–340). At about 9:15 p.m., Carioscia telephoned agent Theisen and told him to go to the Lake Club in Melrose Park (R. 79–80). Then Carioscia drove away from the Steak House in the 1956 Oldsmobile and left his own car in the parking lot (R. 340, 262–263). Carioscia met Theisen at the Lake Club and delivered 235.5 grams of heroin for $3,500 (R. 80–81, 394–395). Meanwhile, at about 9:45 p.m., petitioner began walking back and forth at the Steak House for about thirty minutes, looking outside and returning, and then entering the restaurant section (R. 340). At 10:15 p.m., upon Carioscia's return in the Oldsmobile, he looked around the bar, walked over to the restaurant section, nodded his head, and entered the restaurant where he was observed talking with petitioner (R. 219, 341). At 10:50 p.m., Cari-

oscia left the Steak House in his Pontiac (R. 220, 253). Two days later on June 18, petitioner checked out of the Country Club Motel (R. 39).

On July 7, 14, and 15, 1960, long-distance telephone calls were placed from Armando Pennacchio's Chicago residence to petitioner's New Jersey residence (R. 37). On July 25, and 26, Carioscia informed agent Theisen that he was not then in a position to "do business," but that he should check with him again the first part of August (R. 84–85). On August 4, there were three long-distance telephone calls from Carioscia's Chicago residence to petitioner's New Jersey residence (R. 37–38). On August 6, there was another such call from Armando Pennacchio's residence to petitioner's residence (R. 37). On August 27, Armando Pennacchio informed Theisen that Carioscia and "that other guy" had lost the "stash" and had practically destroyed him (Armando Pennacchio) in the last several weeks, but that he could take care of delivery of a kilogram and a half (R. 87–88). On August 29, Armando Pennacchio delivered 197.8 grams of heroin to agent Theisen for $3,750, and on September 6, the date of his arrest, he delivered 407.49 grams of heroin (R. 88–90, 97–100, 395, 396).

On September 12, 1960, when petitioner was complaining to agent Theisen at the United States Marshal's office, that he had nothing to do with the case, petitioner stated, "That guy is a real * * * yo-yo. He never did use his mind." Petitioner remarked, "I haven't seen him in about four months," and Theisen said, "That's about right." Petitioner suggested that the agents could probably pinpoint the exact day, and

Theisen answered that he thought they could. Petitioner stated, "I told that guy to watch you. I told him then you were an agent." Petitioner then asked, "How much stuff did they get Monsie [the alias of Armando Pennacchio] with?" Theisen told the petitioner that "we had got him with a key in hand" (R. 115–116).

## ARGUMENT

1. Petitioner argues that, in affirming the conviction, the court of appeals did not give sufficient weight to the evidence favorable to him. His argument is a repetition to arguments he made to the jury, and really amounts to no more than an assertion that the jury should have resolved every issue of credibility in his favor.[2] As appears from the Statement, the evidence which the jury had the right to credit amply supports the verdict.

2. Petitioner's claim that there was an improper joinder of offenses is based on his contention that there was no evidence to show that he was a member of the conspiracy. The jury, however, found to the contrary and this conclusion is fully supported by the

[2] The question as to where Carioscia pointed when, on May 28, he said his man was right there and pointed to the bar (see Pet. 12–15) was argued to the jury (R. 494, 513, 532) and was not significant in the light of the total evidence. As to the events on June 16, petitioner argued to the jury, as he does here (Pet. 15–18), that if agent Durkin could have seen petitioner leave the restaurant, surveilling agents watching the entrance would have seen Durkin (see R. 515–517). The jury evidently believed Durkin's testimony that he went to the inner entrance door and that he did not know if the other agents could see him since they would be looking through two thicknesses of glass (R. 360–361). Durkin did not testify, as petitioner states (Pet. 17), that he put his head out of the door (see R. 339).

evidence (see the Statement, *supra*, pp. 3–7). At the very least, the evidence demonstrates that the grand jury had a reasonable basis for charging a conspiracy; consequently, there would have been no prejudicial misjoinder even if the jury had acquitted petitioner on the conspiracy count. *Schaffer* v. *United States*, 362 U.S. 511.

3. *a.* During his closing argument to the jury, government counsel stated (R. 527):

> Every act in this case had been designed by these two defendants with you [in] mind. How do I mean that? Every act, every transaction, every declaration is designed "That if we get caught, how we have insulated ourselves from the ladies and gentlemen of the Federal Jury in this court-room? How have we done that?
>
> Now keep in mind that nothing I have said, or anything that the other attorneys have said in this case is evidence. You heard the evidence from that witness stand under oath, and as to Defendant William Wright it is unrefuted and undenied. Out of one hundred and seventy million people in the United States not one witness took that stand to refute the Government's case. Not from New York or anywhere they would come.
>
> Mr. GLADSTONE [petitioner's counsel]: Just a minute. Your Honor, I want to object to that statement when he says no witness took that stand for Mr. Wright. That includes him and that is an improper remark.
>
> * * * * *
>
> The COURT. I understand but the jury is going to be instructed to the fact that Mr.

> Wright did not take the stand and that cannot be considered against him. It is not necessary for him to take the stand if he doesn't want to.

In its charge to the jury the court said (R. 542):

> The fact that a defendant did not testify in his own behalf in this case does not create any presumption against him, and the jury must not permit that fact to have the slightest influence in arriving at a verdict.

This is not a case where "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States,* 224 F. 2d 168, 170 (C.A. 10). On the contrary, as the court below held (Pet. App. 7), the prosecutor's remarks could not reasonably be construed by the jury as a comment on the failure of petitioner to testify. The statement, "Not from New York or anywhere they would come," demonstrates that the prosecutor was referring to other witnesses since petitioner was already present in the courtroom. Thus, the prosecutor was merely stating that petitioner had offered no evidence to contradict that of the government, a comment which is plainly proper. *Langford* v. *United States,* 178 F. 2d 48, 55 (C.A. 9). Moreover, the court's charge that petitioner's failure to testify created no presumption against him, and must not be considered, cured any possible misinterpretation of the prosecutor's comments in summation. See *United States* v. *Di Carlo,*

64 F. 2d 15, 17–18 (C.A. 2); *United States* v. *Shapiro*, 103 F. 2d 775 (C.A. 2).[3]

*b.* The other remarks about which petitioner now complains (Pet. 27–29) were not objected to at the trial and represent an attempt to find error in a record which fully supports the finding of guilt. Cf. *United States* v. *Goodman*, 110 F. 2d 390, 394 (C.A. 7). Since petitioner did not make timely objections, he has the burden of showing on appeal that the trial court's failure to take some remedial action constituted clear error of substantial prejudice to his case. See Rule 52, F.R. Crim. P. Instead, the remarks quoted by petitioner show on their face that they were well within the limits of permissible advocacy.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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*Attorneys.*

FEBRUARY 1963.

[3] This case is not at all similar to *Ginsberg* v. *United States*, 257 F. 2d 950 (C.A. 5), in which the government attorney made an improper remark based upon pure conjecture that he probably could have produced fifty witnesses to show that the defendant was not of good character, after the defendant had introduced four character witnesses. Here the prosecutor made no conjectural statements as to what evidence witnesses not produced could give on behalf of the government.

U.S. GOVERNMENT PRINTING OFFICE: 1963